an act of deprivation by his employer, have been entitled. (Per Romer L.J. in *Henry* v. *Foster*[5]). In *Chibbett* v. *Joseph Robinson & Sons*[6] it was held that money paid on the termination of employment, which need not continue but was likely to continue, must be treated as compensation for loss of employment. That statement of the law was approved by their Lordships of the Privy Council in *Knight's* case and *Heywood's* case. In *Heywood's* case it was held that even if the appellant was employed under a series of contracts for fixed periods and not under a contract of general hiring, he had a real prospect of employment until he reached the age of 55. The facts of this case are almost identical with the facts of that case. I must therefore hold that the appellant in this case had a similar prospect of continued employment from contract to contract. The payment made to him was therefore compensation for loss of employment. The fact that there was no scheme for calculating such compensation, as there was in *Heywood's* case, makes no difference, because we are not concerned with the basis on which the compensation was calculated. Even if the amount paid to the appellant is to be treated as a gratuity, so long as it was paid in respect of termination of his employment, it is not taxable.

I would allow this appeal with costs both here and in the court below and set aside the assessment of income tax against the appellant.

Ong Hock Sim and **Wan Suleiman F.JJ.** concurred.

Appeal allowed.

Solicitors: *Shearn Delamore & Co.*

DIRECTOR-GENERAL OF INLAND REVENUE v. A.L.B. CO. SDN. BHD.

[F.C. (Gill C.J. (Malaya), Ong Hock Sim and Wan Suleiman F.JJ.) March 1, 1975]

[Kuala Lumpur — Federal Court Civil Appeal No. 90 of 1974]

Income Tax — Company carrying on tobacco business — Company renting out premises — Liability to tax for rents — Whether company entitled to have the losses from tobacco business set off against rental income — Whether unabsorbed capital allowances can be set off against rental income — Income Tax Act, 1967, ss. 4, 5, 42, 43 and Schedule 3, para. 75.

This was an appeal against the decision of Hashim Yeop A. Sani J. ([1974] 2 M.L.J. 76). The respondent company was incorporated with the object *inter alia* of carrying on a tobacco business. For this purpose it purchased land and built a factory. Subsequently the company found that it was not profitable to carry on the tobacco business and it ceased to do so. The land and buildings were let out to other companies. The company was assessed for income tax on the rental income and it sought to have the unabsorbed losses on the tobacco business and the unabsorbed capital allowances set off against the rental income. It was held by Hashim Yeop A. Sani J. that the Special Commissioners were correct in holding that by renting out the portions of the factory building the respondent company were carrying on a business and that the unabsorbed losses could be set off against the rental income. He held however that the unabsorbed capital allowances could not be taken into account in computing the incomes from rents of the respondent company. The Director-General of Inland Revenue appealed and the respondents cross-appealed.

Held, allowing the appeal and dismissing the cross-appeal:

(1) on the facts of this case it seemed clear that the only business which the respondents carried on was its tobacco business, so that it was quite impossible to say that they were carrying on a business of renting their premises;

(2) both the Special Commissioners and the learned judge were therefore wrong in holding that the respondents were carrying on the business of renting and that the unabsorbed losses from the tobacco business could be deducted from the rental incomes;

(3) the respondent's unabsorbed capital allowances relate only to their tobacco business and could not be taken into account even if the renting of their premises could be assumed to be a business.

Cases referred to:-

(1) *Commissioners of Income Tax* v. *Hanover Agencies* [1967] 1 All E.R. 954, 956.

(2) *Fry* v. *Salisbury House Estate Ltd.* 15 T.C. 266, 316.

FEDERAL COURT.

Mohamad Nizar bin Idris (Senior Federal Counsel) for the appellants.

J. Puthucheary for the respondents.

Gill C.J.: This is an appeal from a judgment of Hashim Sani J. on a case stated by the Special Commissioners of Income Tax on the requisition of the appellant. The facts of the case as found by the Special Commissioners are as follows. The respondent company was incorporated on September 2, 1960 with the main object of carrying on a tobacco business. Having purchased for this purpose a piece of land in Petaling Jaya and built thereon a factory to house the cigarette machinery and a bonded warehouse for stocks of cigarettes and tobacco, the company commenced its business on February 14, 1961. Its financial year ended on 30 September.

Initially, the respondents were concerned with cutting and blending tobacco leaves in order to bring them to a condition suitable for rolling into cigarettes. Finding it not profitable to carry on with their tobacco business, they ceased to operate their machinery in November 1961. They also stopped trading in tobacco in 1964 and had no sale of tobacco in 1965. In 1967 their plant and machinery were sold and removed from the factory.

From April 1964 the respondents started granting licences to various companies for the use and occupation of their premises in return for a monthly rental. At first they let out only a part of their premises, but from October 1968 they granted a licence to Gammon South East Asia Berhad for the use and occupation of all their land and the buildings thereon. One of the numerous objects of the respondent company, as contained in paragraph 3(1) of their memorandum of association, was to lease or grant licences over their property.

On August 22, 1970 the Department of Inland Revenue prepared the respondents' tax computation for the years of assessment 1963 to 1970. This showed an accummulated loss of $399,303/- and an un-utilised capital allowance for the industrial buildings of $82,662/- for the year of assessment 1965 and subsequent years of assessment ending with 1970. For the years of assessment 1968 and 1970 the appellant assessed the respondents to income tax on the sums of $7,040/- and $33,234/- respectively as their income in respect of rents, under section 4(d) of the Income Tax

Act, 1967. In doing so, the appellant disallowed the respondents' claim to have their unabsorbed losses and capital allowances set off against their rental incomes.

The respondents appealed to the Special Commissioners against the disallowance of their claim. Their appeal was allowed, whereupon the appellant appealed against the Special Commissioners' decision by way of case stated to the High Court. In the High Court the learned judge dismissed the appellant's appeal on the point concerning the unabsorbed losses, but allowed the appeal in respect of the unabsorbed capital allowances. From that decision of the learned judge the appellant has appealed and there is a cross-appeal by the respondents.

It is to be observed that the question at issue in the appeal before this court is whether, in ascertaining the respondents' income tax for the years of assessment 1968 and 1970, their unabsorbed losses and capital allowances in respect of their tobacco business should be deducted from their rental incomes received long after the tobacco business had ceased. In order to determine that question, it is necessary to consider the scheme of our income tax law as contained in the Income Tax Act, 1967.

The classes of income on which tax is chargeable are contained in section 4 of the Act which reads as follows:

"4. Subject to this Act, the income upon which tax is chargeable under this Act is income in respect of —

(a) gains or profits from a business for whatever period of time carried on;

(b) gains or profits from an employment;

(c) dividends, interest or discounts;

(d) rents, royalties or premiums;

(e) pensions, annuities or other periodical payments not falling under any of the foregoing paragraphs;

(f) gains or profits not falling under any of the foregoing paragraphs."

Section 5 of the Act provides for each source of income to be treated separately for the purpose of ascertaining the basis period, the gross income, the adjusted income and the statutory income. There is no dispute between the parties as to how such ascertainments are made. Section 43(1)(a) provides for the statutory incomes from *all sources making up a business* to be aggregated. Such aggregated income from all business sources is then required to be reduced by any deductions falling to be made under section 43(2), and it is to the remainder of the income after such deductions that statutory incomes from other sources are required to be added. In other words, it is only after aggregating the incomes from all sources making up a business and deducting therefrom such losses as may have been incurred in previous years in such business or businesses that incomes from other sources, if any, are required to be added. Section 45 of the Act provides that chargeable income shall be the total income less the deductions allowed under Chapter 7 which begins with that section and ends with section 51. There is no dispute about such deductions under that Chapter.

In allowing the respondents' appeal for their unabsorbed losses and capital allowances in respect of their tobacco business to be deducted from their rental incomes, the Special Commissioners made a finding that by granting licences over its property the respondent company was carrying on a business for which it was incorporated. The learned judge considered that finding to be a finding of fact which he felt he should not disturb. He found further support for that finding in the following passage from the judgment of the Privy Council in the Jamaican case of *Commissioners of Income Tax* v. *Hanover Agencies Ltd.*[1]: —

"The word 'business' is of wide import and must be given its ordinary meaning, unless the context otherwise requires. The respondents' objects include *inter alia* acquiring of freehold property and the leasing of all or any of the company's property. If a company's objects are business objects and are in fact carried out, it carries on business (*Inland Revenue Comrs.* v. *Westleigh Estates Co., Ltd.* ([1924] 1 K.B. 390, 408, 409; 12 Tax Cases 657, 686) *per* Sir Ernest Pollock M.R.). The respondents are engaged in negotiating leases and collecting rents from their properties. This would *prima facie* indicate that they were carrying on business so as to bring them within the terms of section 8(o)."

The facts in the Jamaican case were as follows. In 1944 a business, one of whose objects was the acquiring and letting of property, was purchased by predecessors of the respondent company. In 1947 the business was vested in the respondent company which was formed to carry it on. The business included that of merchants dealing in hardware and lumber, and that of operating a wharf, as well as that of letting of premises. In 1945 three buildings were purchased by the business ("Bank Building") and were subsequently pulled down, rebuilt and leased. On appeal from an order upholding the respondent company's claim to an allowance for wear and tear in respect of the Bank Building under section 8(o) of the Jamaican Income Tax Law, 1954, it was held that the company was entitled to such an allowance because they were in fact carrying out their object of acquiring and leasing properties and accordingly were carrying on that business, and the profits on which they were assessed arose from the business.

It was argued on behalf of the appellant in the court below that, as the sources of income specified in section 4 of our Income Tax Act are mutually exclusive, rents cannot be a part of business income for the purpose of taxation. This proposition was put forward on the authority of what was decided in *Fry* v. *Salisbury House Estate Ltd.*,[2] but that case was concerned with the English Income Tax Act under which specific incomes are assessed under specific schedules. In *Commissioners of Income Tax* v. *Hanover Agencies Ltd.*[1] the Privy Council said at page 957:

"In their Lordships' opinion the decision in the *Salisbury House* case has no bearing on the construction of the provisions of the Income Tax Law of Jamaica, where there is no parallel to the division of the charge to income tax into various separate and distinct Schedules. Section 5 already referred to is an omnibus section which treats all profits and gains together whether arising from property or from a trade, business, employment or profession, or in respect of rent or emoluments, salaries or wages. These are all treated as profits or gains."

Section 4 of our Act, although differently worded in that it does not speak of all the sources of income under an omnibus provision as "gains or profits", would appear basically to be similar to section 5 of the Jamaican Act. Nevertheless for "rents royalties or premiums" as specified in section 4(d) of our Act to be brought under section 4(a) of the Act as "gains

or profits" from a business, it must be shown that they are derived from a business as such. In my judgment it would be difficult to treat rents as "gains or profits" from a business in the absence of clear evidence that the taxpayer was carrying on a business of acquiring and leasing properties as in the *Hanover Agencies* case.

It is to be observed that the context in which the company in the present case began to grant licences over its property is quite different from the context in which the company in the Jamaican case was carrying on its business. The company here was incorporated with the main object of carrying on tobacco business. Like all other companies it had a number of ancillary objects. So long as it continued its tobacco business it certainly was not carrying on any business of renting its premises. In granting leases over its premises after its tobacco business ceased it was merely receiving income from rents. The collection of such rents was entirely divorced from the business which it had previously carried on.

The memorandum of association of a company by itself is insufficient to decide whether it was carrying on a particular business. The question always is not what business the taxpayer professes to carry on, but what business it actually carries on. In this connection Lord Warrington of Clyffe in *Fry* v. *Salisbury House Estate Ltd.*[2] said at page 316:

"Assuming the Memorandum of Association allows it, and in this case it unquestionably does, a company is just as capable as an individual of being a landowner, and as such deriving rents and profits from its land, without thereby becoming a trader, and in my opinion it is the nature of its operations, and not its own capacity, which must determine whether it is carrying on a trade or not."

Lord Macmillan in the same case said at pages 330 and 331:

"The income of the company being derived from the location of land, or in other words in the normal manner in which property in land yields revenue, it is in my opinion inadmissible to characterise this income as the income of a trade.... A landowner may conduct a trade on his premises, but he cannot be represented as carrying on a trade of owning land because he makes an income by letting it."

It follows from what I have just said that the Special Commissioners misdirected themselves in law when they said that the respondent company was carrying on the business for which it was incorporated when it commenced to grant licences over its property after it had ceased its initial tobacco business in 1964. On the facts of this case it seems clear that the only business which the respondents carried on was its tobacco business, so that it is quite impossible to say that they were carrying on a business of renting their premises.

I agree with the learned judge's conclusion that under section 43 of the Income Tax Act, 1967 the statutory incomes of *each of the sources of a business are aggregated* and that it is this aggregated sum from which "unabsorbed losses" are deducted. But, in view of what I have already said, I cannot, with respect, agree with the learned judge's further conclusion that the decision of the Commissioners to take into account the unabsorbed losses amounting to $399,303 should not be disturbed. I would therefore allow the appellant's appeal.

Coming now to the cross-appeal, I must say at once that I can find no merit in it whatsoever. It is clear that the statutory income of a taxpayer is required to be calculated in respect of each of his sources of income. Section 43 speaks of each of the business sources consisting of a business, indicating that a business can have several sources, and it allows deductions in respect of unabsorbed losses to be made from all the business sources of the taxpayer. Unabsorbed capital allowances, however, are governed by section 42 which provides that the statutory income of a person from *a source* for a year of assessment shall consist of an amount reduced by the amount of any allowances or the aggregate of the allowances falling to be made for that year under the schedule in relation *to that source*. In other words, as the learned judge has rightly pointed out in his judgment, capital allowances in respect of one source of business cannot betaken into account when computing the income from another business source.

The schedule which governs capital allowances is schedule 3 to the Act. Paragraph 75 of that schedule reads:

"75. Where, by reason of an insufficiency or absence of adjusted income of a person from a business of his for the basis period for a year of assessment or by reason of the existence of an adjusted loss from the business for that period, effect cannot be given or cannot be given in full to any allowance or to the aggregate amount of any allowances falling to be made to him for that year in relation to the source consisting of that business, that allowance or that aggregate amount, as the case may be, which has not been so made (or so much thereof as has not been so made to him for that year) shall be deemed to be an allowance to be made for the first subsequent year of assessment for the basis period for which there is adjusted income from that business, and so on for subsequent years of assessment until the whole amount of the allowance or that aggregate amount to be made to him has been made to him."

This paragraph, again as the learned judge has rightly pointed out in his judgment, is explicit in drawing a distinction between "income from a business" and "income from a source consisting of that business." It is therefore clear that the respondents' unabsorbed capital allowances relate only to their tobacco business and cannot be taken into account even if the renting of their premises can be assumed to be a business. I would therefore dismiss the cross-appeal.

In the result I would allow the appellant's appeal and dismiss the respondents' cross-appeal, thus restoring the assessment made by the appellant of the respondents' income tax for the years of assessment 1968 and 1970. In all the circumstances of the case there will be no order as to costs.

Ong Hock Sim and **Wan Suleiman F.JJ.** concurred.

Appeal allowed, cross appeal dismissed.

Solicitors: *Skrine & Co.*